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In The Supreme Court Of The United States

OCTOBER TERM, 1996

LEONARD EDMUNDSON, Administrator of the Estate of James Richard Turnage; ARLENE ROUSE YELVERTON; ROBERT YELVERTON; ERIN JANNELL SHIRLEY, a minor, by and through her guardian, Janice Stocks,

Petitioners,

v.

GRAYHAM KEESLER; DANIEL PETERS; JAMES P. MORGAN; CHESTER HILL; and CITY OF GOLDSBORO, NORTH CAROLINA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is a police officer, who is standing within two to three feet of a rapidly moving vehicle driven by a fleeing felony suspect when he uses deadly force to apprehend that suspect, qualifiedly immune from suit regardless of the suspect's known background and history, regardless of the movement and location of the officer at the time deadly force is utilized, and regardless of the fact that the vehicle is moving away from the officer?

II. When considering an interlocutory appeal from an order denying a defendant's motion for summary judgment based on a qualified immunity defense, may the appellate court disregard the lower court's determination that, considering the facts in the light most favorable to the plaintiff, the defendant officer did not have probable cause to believe that his life or the lives of others were in danger at the time he used deadly force to apprehend a fleeing felony suspect?

III. Does a police officer violate the Fourth Amendment of the United States Constitution when he runs beside and shoots into the driver's-side window of a pickup truck being driven away from the officer by a felony suspect?

PARTIES BELOW

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OPINIONS BELOW

The opinion of the court of appeals is reported in full text format at 1996 U.S. App. LEXIS 30889 (4th Cir. Nov. 27, 1996) (unpublished) and is reported in table case format at 103 F.3d 117 (4th Cir. 1996). (App. 1.) The opinion of the district court is reported at 904 F. Supp. 478 (E.D.N.C. 1995). (App. 17.)

JURISDICTION

The court of appeals entered its decision on November 27, 1996. (App. 1.) On January 2, 1997 the court of appeals denied the petitioners' Petition for Rehearing and Suggestion for Rehearing *In Banc*. (App. 26.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF CASE

A. Nature of Case

On July 2, 1992, Grayham Keesler and Daniel Peters were acting in the course and scope of their employment by the City of Goldsboro and under the supervision of James P. Morgan and Chester Hill when they brutally shot and killed James Richard Turnage while attempting to serve an arrest warrant for his alleged possession of 6.8 grams of marijuana with the intent to sell five months earlier. The evidence offered by the petitioners, including eyewitness affidavits, demonstrates that Turnage had neither a criminal record nor a history of violence and that neither Keesler and

Peters nor anyone else was in danger of being killed or seriously injured at the time Turnage was shot and killed. An eyewitness affidavit shows that Keesler, while in no personal danger, ran beside and shot into the driver's-side window of the pickup truck driven by Turnage as he attempted to drive away.

In its November 27, 1996 opinion, the Fourth Circuit concluded, 2-1, that Keesler and Peters acted reasonably and were entitled to qualified immunity because Keesler was "in serious danger of injury," being "within 2 to 3 feet of a rapidly moving truck" when they shot and killed Turnage as he drove away. The Fourth Circuit reached this conclusion despite the fact that the district court found that neither Keesler nor Peters was in danger at the time they shot and killed Turnage.

B. Statement of Facts

On July 2, 1992, Turnage was a 36-year old male employed by the Franklin Baking Company in Goldsboro, North Carolina. He had neither a criminal record nor a history of violence.

That day, Keesler and Peters traveled to the Franklin Baking Company to serve an arrest warrant on Turnage for the alleged sale of 6.8 grams of marijuana five months earlier. When confronted by Keesler and Peters, Turnage asked if he could finish unloading his delivery truck, and the officers acceded to his request. Roughly forty minutes later, while Keesler and Peters were conversing with Turnage's supervisors, Lionel Ginn and Scott Tyson, Turnage ran out of the warehouse and

into the parking lot in which his pickup truck was parked. The officers followed with guns drawn.

Turnage entered his truck, locked the doors, and started the engine. Keesler, with his gun in hand, was at the passenger side of the truck, trying to open the door and yelling for Turnage to stop. Turnage backed up his truck in a semi-circular manner so that the front of the truck was facing the gate exiting the parking lot. Keesler followed the truck as Turnage drove it backwards, establishing himself in a position near the front corner of the truck, on the driver's side, two to three feet away. Turnage then drove his truck forward and rightward away from Keesler and towards the gate leaving the parking lot. The motion of the truck and Keesler's movements put Keesler to the driver's side of the truck, completely out of the truck's way, as it moved forward and rightward toward the gate. As Turnage began to drive away, Keesler shot his gun toward Turnage. As Turnage continued driving away from Keesler, Keesler ran beside the truck and shot into the driver's-side window two or three more times.

During this incident, Keesler never fell, was never hit by the truck, and was never in danger. While neither Tyson nor Ginn precisely saw Peters' location, Peters was never behind Turnage's truck and was never in danger of being hit. Neither officer nor anyone else was in danger of serious bodily injury from Turnage or his truck before, when, or after the officers shot and killed Mr. Turnage as he attempted to drive away.

C. Proceedings Below

On July 1, 1994, the petitioners filed their Complaint, initiating this civil action.[1] The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 and § 1343(a).

On November 9, 1994, the district court entered an order staying discovery to permit the respondents to seek an order from the court that the individual respondents were entitled to a qualified immunity from suit. The respondents filed a motion for summary judgment, and the petitioners opposed the motion, submitting affidavits from eyewitnesses Scott Tyson and Lionel Ginn. (App. 44, 51.)

In an order filed on November 6, 1995, the district court denied the respondents' motion for summary judgment. (App. 17.) The court examined the

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[1] On January 11, 1996, the district court entered an order dismissing several claims asserted in the Complaint and establishing that only the following claims remained viable in this action: (1) the Estate's claims against the individual defendants and the City of Goldsboro for violations of the Fourth Amendment, (2) the Estate's claims of wrongful death against the individual defendants and the City of Goldsboro, and (3) Alene Yelverton, Robert Yelverton, and Erin Shirley's claims of desecration of body against the City of Goldsboro. (App. ___.) Because the court's order eliminated the claims of Craig Yelverton, Karen Bennett, Kathy Edmundson, and Libby Peele, those plaintiffs are not included as petitioners in this petition, and because the order eliminated all claims against the City of Goldsboro Police Department, the City of Goldsboro Police Department is not included as a respondent in this petition.

facts in the light most favorable to the petitioners, relying upon the affidavits of Ginn and Tyson in reaching its decision. In his affidavit, Ginn states as follows:

> Mr. Turnage then began to drive his truck forward and rightward towards the gate leaving the parking lot. The motion of the pickup truck and Officer Keesler's movements put Officer Keesler to the right side/driver's side of the truck. At this point and time, Officer Keesler was completely out of the way of the pickup truck as it moved forward and rightward toward the parking lot gate. As Mr. Turnage began to drive by Officer Keesler, Keesler then shot his gun toward Mr. Turnage. As Mr. Turnage's truck continued moving forward and away from Officer Keesler, Officer Keesler ran beside the truck and shot into the driver's side window two or three more times. Officer Keesler never fell, and he was not hit by the truck. When I saw him shoot his gun, Officer Keesler was not in danger of being hit by the truck. I could not believe what I was seeing, I could not believe Officer Keesler shot Mr. Turnage.

(App. 44.) In his affidavit, Tyson states as follows:

> Officer Keesler was not in danger of being struck by the truck and his life was not in danger at the time he shot Ricky Turnage, as the truck was moving away from him and toward the parking lot exit.

(App. 51.)

Relying on these affidavits, the court concluded that no reasonable officer in the position of Keesler and Peters could have believed that he had probable cause to believe that Turnage posed a significant threat of death or serious physical injury and, therefore, rejected the respondents' qualified immunity defense and denied their motion for summary judgment.

The respondents filed interlocutory appeals which the petitioners moved to dismiss for lack of jurisdiction. The Fourth Circuit denied the petitioners' motion, 2-1. (App. 29, 31.)

On November 27, 1996, the Fourth Circuit vacated the district court's order denying the respondents' motion for summary judgment and remanded the case with instructions to the district court to enter judgment in favor of the respondents on the constitutional claims and to dismiss the state law claims without prejudice. (App. 1.) Judge Hall wrote a dissenting opinion. On January 2, 1997, the court denied the petitioners' Petition for Rehearing and Suggestion for Rehearing *In Banc*. (App. 26.)

In its November 27, 1996 opinion, the Fourth Circuit asserted that "[b]ecause this interlocutory appeal concerns the issue of whether, based on the facts viewed in a light most favorable to the plaintiff, the officers' conduct violated clearly established law, we have jurisdiction." Thus, the issue before the court was

whether Keesler's and Peters' conduct violated clearly established law. The court recognized that the legal standard governing the use of deadly force by police officers to apprehend fleeing felony suspects was clearly established at the time Turnage was shot and killed. The court then turned to the issue of whether Keesler and Peters had violated this clearly established legal standard.

The court examined the affidavits of Ginn and Tyson and concluded as follows:

> Even in this light, the officers were entitled to qualified immunity because at the moment when Keesler used deadly force against Turnage, it was objectively reasonable for Keesler to view the use of deadly force as not excessive when considering the extremely dangerous circumstances confronted by the officers--a rapidly moving truck driven by a fleeing felon and Keesler's close proximity to the truck.

The court asserted that this case was nearly indistinguishable from two previous decisions of the Fourth Circuit: Drewitt v. Pratt, 999 F.2d 774 (4th Cir. 1993) and Pittman v. Nelms, 87 F.3d 116 (4th Cir. 1996). The court asserted that "as in Drewitt and Pittman, an officer, here Keesler, was in serious danger of injury--Keesler was within 2 to 3 feet of a rapidly moving truck." Based on these facts, the court concluded, as a matter of law, that Keesler and Peters "acted reasonably," that their conduct did not violate the

Constitution, and that, therefore, they were entitled to a qualified immunity.

In his dissenting opinion, Judge Hall agreed that the relevant legal standard was clearly established, citing Tennessee v. Garner, 471 U.S. 1 (1985). Judge Hall described the decision of the district court as follows:

> In other words, the district court felt that the picture painted by Ginn and Tyson was that Keesler ran alongside the truck as it was pulling away from him, and that a permissible inference from this picture was that the shots were fired solely to stop the fleeing Turnage. Under what I think we all agree was the established law, this is a picture of excessive force.

Judge Hall pointed out that the majority ignored the factual determinations made by the district court, substituting its interpretation of the record for that of the district court and reducing "the picture drawn by the plaintiff to 'extremely dangerous circumstances confronted by the officers--a rapidly moving truck driven by a fleeing felon and Keesler's close proximity to the truck.'" By ignoring the factual determinations made by the district court, Judge Hall believed that the district exceeded its authority in this interlocutory appeal, citing Johnson v. Jones, 115 S. Ct. 2151 (1995).

REASONS FOR GRANTING THE PETITION

Beginning with Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982), this Court has defined the framework for analyzing a qualified immunity defense. See also Siegert v. Gilley, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991); Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). These decisions indicate that the analysis of a qualified immunity defense should proceed upon two levels. See, e.g., Pittman v. Nelms, 87 F.3d 116, 118-19 (4th Cir. 1996). The first level of analysis asks whether the defendant's conduct violated a constitutional right of the plaintiff, and the second level of the analysis asks whether the defendant is, nevertheless, entitled to a qualified immunity from suit. See, e.g., id. Although conceptually the immunity level of the analysis is reached only if it has first been determined that the defendant violated a constitutional right of the plaintiff, defendants usually raise the immunity issue preliminarily, before a determination has been made whether the defendant violated a constitutional right of the plaintiff. See, e.g., id.

When confronted with a qualified immunity defense that has been asserted preliminarily in a motion for summary judgment, the trial court may combine the constitutional inquiry with the immunity inquiry by asking whether the plaintiff has "alleged the violation of a clearly established constitutional right." See Siegert, 500 U.S. at 231, 111 S. Ct. at 1793-94, 114 L. Ed. 2d at ___; Pittman, 87 F.3d at 119. In answering this question, the court must consider the facts in the light most favorable

to the plaintiff and deny the motion if genuine issues of material fact exist. See, e.g., Buonocore v. Harris, 65 F.3d 347, 359-60 (1995); see also Mitchell, 472 U.S. at 526, 105 S. Ct. at 2815, 86 L. Ed. 2d at ____.

In the instant case, the Fourth Circuit stated that the issue before it was "whether, based on the facts viewed in the light most favorable to the plaintiff, the officers' conduct violated clearly established law." The court concluded that the legal standards governing Keesler's and Peters' conduct were clearly established. The remaining issue before the court was the constitutional component of the analysis--whether Keesler's and Peters' conduct, considered in the light most favorable to the petitioners, was unconstitutional.

In its decision, the Fourth Circuit erroneously concluded that Keesler's and Peters' conduct was objectively reasonable and did not violate Turnage's constitutional rights and that, therefore, Keesler and Peters were entitled to a qualified immunity. In reaching this erroneous conclusion, the Fourth Circuit's decision is inconsistent with decisions of this Court, the Seventh Circuit, and the Ninth Circuit and raises important issues that should be addressed by this Court.

I. The Decision of the Fourth Circuit in this Case Conflicts With Decisions of the Seventh Circuit and the Ninth Circuit.

In its opinion, the Fourth Circuit held that a police officer who runs beside and shoots into the driver's-side window of a vehicle being driven away from

the officer by a felony suspect who, as the officer knows, has no previous criminal record is entitled to a qualified immunity. The court concluded that a police officer who is "within 2 to 3 feet of a rapidly moving truck" driven by a fleeing felony suspect and who uses deadly force to apprehend that suspect is entitled to a qualified immunity from suit regardless of the suspect's known background and history, regardless of the movement and location of the officer at the time deadly force is utilized, and regardless of the fact that the truck is moving away from the officer. In reaching this conclusion, the decision of the Fourth Circuit is inconsistent with the decision of the Seventh Circuit in Estate of Starks v. Enyart, 5 F.3d 230 (7th Cir. 1993) and the decision of the Ninth Circuit in Acosta v. City and County of San Francisco, 83 F.3d 1143 (9th Cir. 1996).

Estate of Starks v. Enyart involved facts similar to those in the instant case. Starks stole a taxicab and drove it to a Taco Bell, parking it on the passenger side of another car. Officer Enyart, spotting the stolen taxicab, parked his police car six to eight feet behind it. Officers Black and Shaffer also pulled into the parking lot, parking their car behind Enyart's car. The three police officers approached Starks' vehicle, with Black moving to the front, Shaffer moving to the rear, and Enyart approaching the driver's door. As Enyart began to open the door, Starks grabbed it with both hands, slammed it shut, and locked all of the doors. He put the car in reverse and backed the cab into Enyart's police car. He then drove forward and toward the right, but his path was blocked by a utility pole, behind which stood Black. Starks reversed again to improve the angle of the cab to the pole. Starks then put the cab in drive

and floored the accelerator. He would have cleared the pole and escaped, but, at some point, Black moved in front of the vehicle and shot and killed Starks.

The plaintiff sued the police officers for violating Starks' constitutional rights. The district court denied the defendants' motion for summary judgment that was based on a qualified immunity defense, and the defendants appealed. The Seventh Circuit concluded that, apart from Black's appearance at the front of cab, the police officers were not entitled to a qualified immunity, stating as follows:

> The defendants knew that the underlying crime was not accomplished violently. They also knew that Starks was attempting to escape in the face of a clear show of authority by the police. But his escape attempt did not involve menacing a police officer or civilian with a weapon – at least not until Black stepped into the path of a car that had just begun to accelerate quickly. The defendants' argument that Starks was operating the cab recklessly does not comport with the plaintiffs' version of the facts. Accepting the plaintiffs' version, as we must at this juncture, his attempt to maneuver the cab was not so reckless that, apart from Black's appearance at the front of the cab, police officers could reasonably fear for their safety or the safety of the community. Therefore, it cannot be concluded that a reasonable officer could believe that Starks fit the description of a fleeing felon against whom deadly force could legitimately be used.

Id. at 233. The court further concluded that despite the fact that Black was in front of the vehicle at the time he shot, he was not entitled to a qualified immunity because the plaintiff's evidence showed that Black moved in front of the cab without leaving Starks time to stop. Finally, the court also recognized that summary judgment was inappropriate because the evidence did not conclusively establish that the cab presented a threat of serious physical harm, stating as follows:

> First, Black moved out of the path of the car without being struck. Second, it is unclear how fast the cab was moving, even with a floored accelerator, from a full stop after less than ten feet. These facts should also be settled by the fact finder.

Id. at 234 n.1.

Thus, contrary to the decision of the Fourth Circuit in this case, the Seventh Circuit has concluded that a police officer is not entitled to a qualified immunity simply because he was within two to three feet of a moving vehicle. Other facts are relevant to the determination of whether an officer is entitled to immunity, including the direction in which the vehicle was moving, the speed at which the vehicle was moving, whether the underlying crime was accomplished violently, whether the escape involved menacing a police officer or a civilian with a weapon, and whether the officer could have safely moved out of the way of the vehicle. The Seventh Circuit specifically concluded that a police officer may not be entitled to a qualified immunity even if he shoots a fleeing felony suspect from a position near to and in front

of a moving vehicle. Contrary to the Seventh Circuit, the Fourth Circuit concluded that officers are entitled to a qualified immunity when they use deadly force to apprehend a fleeing felony suspect, despite evidence that they were not in the path of the vehicle and were in no physical danger.

The Fourth Circuit's decision is also inconsistent with Acosta v. City and County of San Francisco, a case which is factually similar to the instant case. Officer Yawczak was standing in front of his car when he heard a woman scream and saw two young men, Pecson and Silva, running with what he believed to be a purse. Yawczak drew his gun and chased Pecson and Silva around the block. Pecson and Silva got into a waiting car driven by Acosta. The parties' evidence conflicted regarding what happened next, but evidence was presented that Yawczak moved to a position in front of the vehicle and shot and killed Acosta when the vehicle began to move forward, despite the fact that the position of the officer, the speed of the vehicle, and the direction of the vehicle would have permitted Yawczak to step to the side of the vehicle and avoid injury.

The jury returned a verdict in favor of the plaintiffs, finding that Yawczak violated Acosta's constitutional rights by using excessive force against him. Thereafter, the district court granted Yawczak's motion for judgment notwithstanding the verdict on the merits as a matter of law and on the ground of qualified immunity. The plaintiffs appealed.

The court recognized that several factual issues were relevant to the excessive force and qualified immunity issues, stating as follows:

> The jury in this case was faced with conflicting evidence regarding various factual issues. Among them were: whether one of the passengers said "run him over" prior to Yawczak's first shot at Acosta; whether Yawczak saw Acosta move the car transmission lever into gear; whether the car was moving in the direction of Yawczak prior to the first shot; if the car was moving, how fast; and Yawczak's location at the time he fired the shots.

Id. at 1146. The court noted that the district court apparently based its decision on the fact that it believed that Acosta had moved forward prior to Yawczak firing the shot that killed Acosta. The court, however, concluded that even if Acosta had moved forward before Yawczak shot, Yawczak may have used excessive force when he shot and killed Acosta, stating as follows:

> On the basis of the evidence presented at trial, the jury could have reasonably concluded that a reasonable officer, who had positioned himself facing the driver so that he was standing closer to the side than the dead-center of the car, would have recognized that he could avoid being injured when the car moved slowly, by simply stepping to the side. In short, a juror could have reasonably reached the conclusion at which the jury appears to have arrived: that the car did move prior to Yawczak's shooting Acosta but that it was moving or rolling sufficiently slowly that a reasonable officer in Yawczak's position

would not have perceived himself to be in danger of serious bodily harm.

Id. at 1146-47.

Thus, like the Seventh Circuit and unlike the Fourth Circuit, the Ninth Circuit has concluded a police officer is not entitled to a qualified immunity simply because he is within two to three feet of a moving vehicle. Other facts, such as the direction in which the vehicle was moving, the speed at which the vehicle was moving, and whether the officer could have safely moved out of the way of the vehicle, are relevant to the determination of whether the officer used excessive force or is entitled to a qualified immunity.

II. The Decision of the Fourth Circuit Conflicts With the Decision of this Court in Johnson v. Jones.

In Johnson v. Jones, this Court limited the issues that may be reviewed by an appellate court in an interlocutory appeal from the denial of a motion for summary judgment that was based on a qualified immunity defense. Specifically, the Court concluded that in such an appeal, the appellate court may review whether "a given set of facts violates clearly established law." ____ U.S. ___, ___, 115 S. Ct. 2151, 2159, 132 L. Ed. 2d 238, ___ (1995). The appellate court may not, however, review factual determinations made by the district court and may not substitute its interpretation of the affidavits submitted for that of the district court. See id.

In its opinion, the Fourth Circuit concluded that Keesler and Peters were entitled to a qualified immunity because their actions were not unconstitutional. Specifically, the court concluded the officers' conduct was objectively reasonable because Keesler "was in serious danger of injury" during this incident, as he was "within two to three feet of a rapidly moving truck." In reaching this conclusion, however, the Fourth Circuit did not rely upon the facts that were found by the district court and that were contained in the affidavits submitted by the plaintiffs.

In his affidavit, Lionel Ginn states as follows:

> Officer Keesler was completely out of the way of the pickup truck as it moved forward and rightward toward the parking lot gate. . . . As Mr. Turnage's truck continued moving forward and away from Officer Keesler, Officer Keesler ran beside the truck and shot into the driver's side window two or three more times. Officer Keesler never fell, and he was not hit by the truck. When I saw him shoot his gun, officer Keesler was not in danger of being hit by the truck. I could not believe what I was seeing. I could not believe Officer Keesler shot Mr. Turnage.

Similarly, in his affidavit, Scott Tyson states as follows:

> Officer Keesler was not in danger of being struck by the truck and his life was not in danger at the time he shot Ricky Turnage, as the truck was

moving away from him and toward the parking lot exit.

Considering these affidavits in the light most favorable to the plaintiffs, the district court determined that Turnage backed his truck in a semi-circular manner, positioning his truck so that it pointed in the direction of the parking lot gate leading to the public street. Keesler "followed the truck placing himself two to four feet from the front corner on the driver's side." From this stopped position, Turnage then began to drive away from Keesler. The court did not conclude that the truck was rapidly moving, but merely that it was accelerating from a stationary position. Keesler then fired his gun toward Turnage and "ran up beside the truck shooting again into the driver's side window." Contrary to the facts relied upon by the Fourth Circuit in reaching its decision, the district court determined that Keesler was not in serious danger of injury during this incident because he was standing several feet from truck as it drove away.

As Judge Hall recognized in his dissenting opinion, although the majority may have disagreed with the factual determinations made by the district court when it denied the defendants' motion for summary judgment, the Fourth Circuit, under Johnson v. Jones, was bound by those determinations. Accordingly, when the Fourth Circuit disregarded the factual determinations made by the district court and based its decision on a different set of facts, most significantly its contrary determination that Keesler was in serious danger, the Fourth Circuit exceeded the scope of its appellate jurisdiction in this interlocutory appeal.

The Fourth Circuit's disregard of the facts found by the district court is particularly significant in this case because if, as stated in the affidavits submitted by the petitioners and as found by the district court, Keesler shot Turnage as he was driving away from Keesler, leaving Keesler out of danger, Keesler violated Turnage's clearly established constitutional rights. As stated by Judge Hall, "[u]nder what . . . we all agree was the established law, this is a picture of excessive force."

III. The Decision of the Fourth Circuit Conflicts With the Decision of this Court in Tennessee v. Garner.

In its opinion, the Fourth Circuit concluded that Keesler and Peters were entitled to a qualified immunity because they did not violate the constitutional rights of Turnage. Specifically, the Court concluded that when Keesler ran beside and shot into the driver's-side window of the pickup truck that was being driven away from him, Keesler "acted reasonably." The Fourth Circuit did not simply hold that, regardless of whether the officers violated Turnage's constitutional rights, they were, nevertheless, entitled to a qualified immunity from suit. Instead, the Fourth Circuit held that the officers acted reasonably and did not violate the constitution.

In reaching this conclusion, the Fourth Circuit's decision is inconsistent with Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). In Garner, this Court held as follows:

> This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

Id. at 3, 105 S. Ct. at 1697, 85 L. Ed. 2d at 4. This Court further stated the following:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.

Id. at 11, 105 S. Ct. at 1701, 85 L. Ed. 2d at 9-10.

In the instant case, the Fourth Circuit has concluded that any time a police officer is "within 2 to 3 feet of a rapidly moving truck" being driven by a fleeing felony suspect, the police officer is entitled to use deadly force to apprehend the suspect. Even if the fleeing suspect is driving away from the police officer, the police officer is running beside the vehicle shooting into the driver's-side window to prevent the escape, and eyewitnesses testify that the police officer was never in danger of being hit by the vehicle, under the decision of the Fourth Circuit in this case, the police officer is entitled to use deadly force. This decision is inconsistent with Garner.

IV. The Decision of the Fourth Circuit is Erroneous and the Questions Presented by the Decision Are Important.

The Fourth Circuit's decision is erroneous in three respects. First, the court erroneously concludes that a police officer who runs beside and shoots into the driver's-side window of a vehicle being driven away from the officer by a fleeing felony suspect who, as the officer is aware, has no criminal record is entitled to a qualified immunity even if eyewitness affidavits state that the police officer was never in serious danger. Second, as noted by Judge Hall in his dissenting opinion, the Fourth Circuit erroneously disregarded the district court's determination that neither Keesler and Peters nor anyone else was in danger at the time the officers shot and killed Turnage and that no reasonable officer in the position of Keesler and Peters could have believed that Keesler was in danger. Finally, the Fourth Circuit erroneously

concluded that a police officer who runs beside and shoots into the driver's-side window of a vehicle that is being driven away from the officer by a fleeing felony suspect has acted reasonably and has not violated the constitutional rights of the suspect, despite the fact that, considering the facts in the light most favorable to the plaintiff, the officer was not in danger at the time of the shooting.

It is important that this Court address the issues raised by and cure the errors in the Fourth Circuit's decision. This decision is inconsistent with previous decisions of this Court and decisions of other circuits. Moreover, this case sets a dangerous precedent that is an extreme departure from prior law and permits police officers to use deadly force under circumstances previously unrecognized.

Under the Fourth Circuit's rule in this case, a police officer may use deadly force to apprehend felony suspects who are fleeing by vehicle any time a police officer is within two to three feet of the vehicle, regardless of the suspect's known background and history, regardless of the movements and location of the officer at the time deadly force is utilized, and regardless of the fact that the vehicle is moving away from the officer. Under the Fourth Circuit's rule, not only is the officer in this situation entitled to a qualified immunity from suit, but the officer has not violated the constitutional rights of the suspect. The qualified immunity has become absolute.

Following the decision in this case, a police officer in the Fourth Circuit can use deadly force to apprehend any felony suspect who attempts to drive away from the officer. An officer who becomes angry and embarrassed when a suspect attempts to flee and uses deadly force to apprehend the suspect will be entitled to an immunity from suit as long as he submits an affidavit, which cannot be challenged through discovery, stating that he feared for his life at the time. The officer will be immune from suit even if eyewitnesses provide affidavits stating that the officer was never in danger.

In sum, the Fourth Circuit has rendered a decision that is contrary to law, that sets dangerous precedent, and that this Court should consider and reverse.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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CERTIFICATE OF SERVICE

I certify that on this 2nd day of April, 1997, pursuant to counsel's instructions, I mailed by certified mail, return receipt requested, FORTY (40) copies of the foregoing Petition for Writ of Certiorari and Appendix to Writ to the Clerk's Office of the Supreme Court of the United States, and mailed by first class United States mail, postage prepaid, THREE (3) copies to all counsel of record:

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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LEONARD EDMUNDSON, Administrator of the Estate of James Richard Turnage, Deceased; ALENE ROUSE YELVERTON; ROBERT YELVERTON; CRAIG YELVERTON; KAREN BENNETT; KATHY EDMUNDSON; LIBBY PEELE; ERIN JANNELL SHIRLEY, a minor, by and through her guardian, Janice Stocks; JANICE STOCKS, as Guardian ad Litem for the above,

Plaintiffs-Appellees,

v.

GRAYHAM KEESLER, individually and in his official capacity as an officer of the City of Goldsboro Police Department; DANIEL PETERS, individually and in his official capacity as an officer of the City of Goldsboro Police Department; JAMES P. MORGAN, individually and in his official capacity as Police Chief of the City of Goldsboro Police Department; CHESTER HILL, individually and in his official capacity as the Police Chief for the City of Goldsboro Police Department,

Defendants-Appellants,

and

THE CITY OF GOLDSBORO POLICE DEPARTMENT; CITY OF GOLDSBORO,

Defendants.

LEONARD EDMUNDSON, Administrator of the Estate of James Richard Turnage, Deceased; ALENE ROUSE YELVERTON; ROBERT YELVERTON; CRAIG YELVERTON; KAREN BENNETT; KATHY EDMUNDSON; LIBBY PEELE;ERIN JANNELL SHIRLEY, a minor, by and through her guardian, Janice Stocks; JANICE STOCKS, as Guardian ad Litem for the above,

Plaintiffs-Appellees,

v.

CITY OF GOLDSBORO,

Defendant-Appellant,

and

GRAYHAM KEESLER, individually and in his official capacity as an officer of the City of Goldsboro Police Department; DANIEL PETERS, individually and in his official capacity as an officer of the City of Goldsboro Police Department; JAMES P. MORGAN, individually and in his official capacity as Police Chief of the City of Goldsboro Police Department; CHESTER HILL, individually and in his official capacity as the Police Chief for the City of Goldsboro Police Department; THE CITY OF GOLDSBORO POLICE DEPARTMENT,

Defendants.

Appeals from the United States District Court
for the Eastern District of North Carolina, at Raleigh,
Terrence W. Boyle, District Judge.
(CA-94-467-5-B0(3))

Argued: September 26, 1996
Decided: November 27, 1996

Before HALL, NIEMEYER, and HAMILTON,
Circuit Judges.

Vacated and remanded with instructions by unpublished opinion. Judge Hamilton wrote the majority opinion, in which Judge Niemeyer joined. Judge Hall wrote a dissenting opinion.

COUNSEL

ARGUED: Kenneth Ray Wooten, WARD & SMITH, P.A., New Bern, North Carolina, for Appellants. Zebulon Dyer Anderson, SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P., Raleigh, North Carolina, for Appellees. **ON BRIEF:** John R. Green, WARD & SMITH, P.A., New Bern, North Carolina, for Appellants. James K. Dorsett, III, Steven M. Sartorio, SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P., Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

HAMILTON, Circuit Judge:

Pursuant to 42 U.S.C. § 1983, the plaintiff/appellee, Leonard Edmundson, administrator of the estate of James Richard Turnage, sued the defendants/appellants, Officers Grayham Keesler and Daniel Peters, alleging that Keesler and Peters deprived Turnage of his rights guaranteed by the Fourth and Fourteenth Amendments when Turnage was shot while attempting to flee. The plaintiff also alleged that the defendants/appellants, Chester Hill, Chief of Police of the Goldsboro Police Department, and James Morgan, former Chief of Police of the Goldsboro Police Department, were liable for the shooting of Turnage under a theory of supervisory liability, and that the defendant/ appellant, the City of Goldsboro, North Carolina, was independently liable for providing its officers inadequate training. See 42 U.S.C. § 1983.[1] The defendants appeal the district court's denial of their motion for summary judgment on the plaintiff's § 1983 claims. For reasons that follow, we vacate the district court's order denying the defendants' motion for summary judgment on the plaintiff's § 1983 claims and remand with instructions to enter judgment in favor of the defendants on these claims. Because all of the federal claims are without merit, we instruct the district court on

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[1] In addition to the constitutional claims, several state law claims were raised by the estate and members of Turnage's family, none of which are before the court.

remand to dismiss without prejudice the remaining state-law claims.

I

The evidence submitted by the defendants in support of their motion for summary judgment revealed the following. According to Keesler and Peters, on July 2, 1992, they went to the Franklin Baking Company in Goldsboro, North Carolina, to arrest James Richard Turnage, a Franklin Baking Company employee, for felony possession with intent to distribute and distribution of marijuana. When the officers presented Turnage with the arrest warrant Turnage asked if he could finish unloading his delivery truck. The officers acquiesced.

While Turnage was unloading his truck, he ran from the bakery warehouse to his personal pickup truck, which was located in the gravel parking lot adjacent to the warehouse. A fence surrounded the parking lot, with one gate providing the only means of exiting the lot.

Seeing Turnage run for his truck, Keesler and Peters ran after him, calling for him to stop. Refusing to heed the officers' command, Turnage got into his truck, locked the doors, and started the engine. Turnage then backed up his truck in a semi-circular manner so that the front of his truck was facing the gate exiting the parking lot. When the truck stopped, Keesler was positioned in front of the truck, toward the passenger's side, and Peters was positioned near the driver's side door.

As Turnage accelerated quickly forward and slightly to the right, toward the exit, the truck struck Keesler but did not knock him down. At this point, Keesler stood with his chest and left hand on the hood and with his gun pointed at Turnage. To avoid being run over by the truck, Keesler continued to back up as the truck accelerated forward. When Keesler perceived that "Turnage was not going to stop, but that he was going to continue accelerating into [him]," (J.A. 182), Keesler fired one shot through the windshield. Believing that Keesler's life was in danger, Peters fired two shots through the driver's side window.

After the shots, the truck proceeded through the gate, into the street and stopped after it hit a pole. As a result of the injuries he received from the shots, Turnage died.

The defendants also submitted the affidavits of two witnesses to the shooting who confirmed the officers' account. One witness, E.T. Franklin Sr., observed Keesler in front of Turnage's truck and firing only after Turnage drove toward Keesler. Franklin also observed Peters on the driver's side of the truck and firing his shots after Keesler's. Another witness, Jimmy Stewart, observed Keesler in front of Turnage's truck with his left hand on the hood as Turnage drove forward toward Keesler. Stewart also averred that Keesler fired his weapon as the truck moved toward Keesler.

The defendants also submitted the affidavits of two experts who examined and evaluated the physical evidence. Their examination and evaluation of the

physical evidence also confirmed the officers' account. Tire impressions on the gravel parking lot revealed that the truck accelerated quickly backward and then accelerated forward. Ballistic report revealed that one bullet was fired from Keesler's weapon, and two from Peters' weapon. The physical evidence showed that the path of one bullet was from a position in front of and slightly to the left of the truck's front center. The physical evidence also showed that one bullet came from position slightly in front of the driver's side door and another from a position beside the driver's side door. Finally, Keesler's left palm print was found on the passenger side of the hood of the truck.

In response to the defendants' motion for summary judgment the plaintiff submitted affidavits from two of Turnage's supervisors, Lionel Ginn and William Tyson. According Ginn, as Turnage's truck moved backwards in a semi-circular direction, Keesler followed the truck, placing him in a position two to three feet from the front corner on the driver's side of the truck. As the truck moved forward and to the right toward the exit, Keesler fired his weapon at Turnage and then ran beside the truck shooting again twice into the driver's side. According to Tyson, as Turnage's truck moved forward and to the right toward the exit Keesler pushed off the truck and moved over to the driver's side of the truck out of the path of the truck." (J.A. 313). Keesler then fired into the truck through the driver's side window. According to Ginn and Tyson, Peters was neither behind the truck nor in their field of vision. As the truck left the lot, Ginn and Tyson saw Peters near the front gate of the parking lot.

The district court denied the defendants' motion for summary judgment based on qualified immunity, concluding that the affidavits of the plaintiff's two eyewitnesses created "a genuine issue of material fact critical to the legal determination of whether reasonable officers would have known that their actions were unconstitutional." (J.A. 324). The defendants appeal.[2]

II

We first address the defendants' contention that Keesler and Peters were entitled to qualified immunity. Under the doctrine of qualified immunity, government officials are immune from liability "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Consequently, qualified immunity attaches when the government actor's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A qualified immunity defense is established if: (1) the government actor's action did not violate clearly established law, or (2) it was objectively reasonable for the government actor to believe that his action did not violate such law.

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[2] Because this interlocutory appeal concerns the issue of whether, based on the facts viewed in light most favorable to the plaintiff, the officers' conduct violated clearly established law, we have jurisdiction. *See Behrens v. Pelletier*, 116 S. Ct. 834 (1996); *Johnson v. Jones*, 115 S. Ct. 2151 (1995).

See *Anderson*, 483 U.S. at 641; *Harlow*, 457 U.S. at 818-19.

It is clearly established that under the Fourth Amendment individuals have the right to be free of excessive force and that there are constitutional limitations on the use of deadly force during the course of an arrest. *See Graham v. Connor*, 490 U.S. 386, 395-96 (1989). Thus, Keesler's and Peters' entitlement to qualified immunity turns on an assessment of the objective reasonableness of their belief that their conduct did not violate Turnage's right to be free of excessive force.

In determining whether the force used to effect a seizure was reasonable, and, therefore, not excessive, we apply an objective reasonableness test that examines "the facts and circumstances of each particular case," including, among other factors, "whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting evade arrest by flight." *Id.* at 396.

The objective reasonableness test is met if "officers of reasonable competence could disagree" on the legality of the defendant's actions. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The Supreme Court has made it clear that an officer's actions are not to be assessed with 20/20 hindsight. *Graham*, 490 U.S. at 396. Rather, "qualified immunity serves to protect police from liability and suit when they are required to make on-the-spot judgments in tense circumstances." *Lennon v. Miller*, 66 F.3d 416, 424 (2d Cir. 1995).

Here, the facts in a light most favorable to the plaintiff demonstrate that Keesler, while positioned within two or three feet of a rapidly moving truck, fired all three shots, and Peter was at no time in the vicinity of the truck. Even in this light, the officers were entitled to qualified immunity because at the moment when Keesler used deadly force against Turnage, it was objectively reasonable for Keesler to view the use of deadly force as not excessive when considering the extremely dangerous circumstances confronted by the officers--a rapidly moving truck driven by a fleeing felon and Keesler's close proximity to the truck. Indeed, in similar circumstances, we have upheld the use of deadly force.

For example, in *Drewitt v. Pratt*, after observing Drewitt driving recklessly, Officer Pratt ran toward the car with his gun drawn, ordering Drewitt to stop. 999 F.2d 774, 776 (4th Cir. 1993). Instead, Drewitt sped up, catching Pratt on the hood of the car. *Id.* At that point Pratt fired. *Id.* We affirmed the district court's holding that Pratt's actions were objectively reasonable and, therefore, Pratt was entitled to qualified immunity. *Id.* at 780.

We reached a similar result in *Pittman v. Nelms*, 87 F.3d 116 (4th Cir. 1996). There, the plaintiff was a passenger in a vehicle driven by Timothy Hudson. Officers Nelms and Banks approached the vehicle and confronted Hudson. As Hudson attempted to drive away, Banks's arm became entangled inside the window of the vehicle. Banks was dragged twenty-five to thirty feet before his arm finally came free, and he was thrown

aside. *Id.* at 118. Banks then rose and fired at the car. Nelms, who could see that Banks had not been run over and killed, also shot at the vehicle when it was approximately twenty-five feet away; the shot that Nelms fired struck Pittman. *Id.* at 120. We held that the force used by Officer Nelms was not excessive, and, therefore, Nelms properly was entitled to qualified immunity. *Id.*

This case is nearly indistinguishable from *Drewitt* and *Pittman*. Similar to *Drewitt* and *Pittman*, this case involved circumstances that were "tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 397. In addition, as in *Drewitt* and *Pittman*, an officer, here Keesler, was in serious danger of injury--Keesler was within two to three feet of a rapidly moving truck. The law does not require that an officer be struck before he can discharge his weapon in an effort protect himself from harm. Indeed, similar perceptions of danger have served as a basis for qualified immunity even where those perceptions were mistaken. *See, e.g., Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991) (holding that officer's perception that suspect was reaching for gun reasonable when suspect was in fact holding only a bottle).

Under the circumstances confronted by Keesler, "an objectively reasonable officer certainly could have believed that his decision to fire was legally justified." *Pittman*, 87 F.3d at 120. Accordingly, Keesler was entitled to qualified immunity.

With regard to Peters, plaintiff's evidence places him at a distance from the events and suggests that he did not apply any force to Turnage. Because Keesler was

entitled to qualified immunity, Peters, as a non-shooter, was as well. *See Hinkle v. City of Clarksburg*, 81 F.3d 416, 420 (4th Cir. 1996) ("In the absence of any underlying use of excessive force against Wilson, liability cannot be placed on either the non-shooting officers, a supervisor, or the City.").[2]

III

Our conclusion that the officers acted reasonably is dispositive of the § 1983 claims against Hill, Morgan, and the City of Goldsboro. In the absence of any constitutional violation by the officers, the claims against Hill, Morgan, and the City of Goldsboro fail. *See id.*; *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 724 (4th Cir. 1991) (holding that a claim of inadequate training cannot be established under § 1983 absent a finding of a constitutional violation by the person being supervised), *cert. denied*, 502 U.S. 1095 (1992); *see also Belcher v. Oliver*, 898 F.2d 32, 36 (4th Cir. 1990) ("Because . . . there was no constitutional violation we need not reach the question of whether a municipal policy was responsible for the officers' actions . . . . Plaintiff's effort to turn this lawsuit into one for inadequate training of personnel . . . is unavailing where there has been no underlying constitutional infraction.").

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[2] We note that with respect to Peters, we would reach the same result even if he discharged his weapon, which is the case under the defendants' version of the facts. Under *Drewitt* and *Pittman*, in light of the dynamic circumstances confronted by the officers, Peters could have reasonably believed that Keesler was in imminent danger.

IV

For reasons stated herein, we vacate the district court's order denying the defendants' motion for summary judgment on the plaintiff's § 1983 claims and remand with instructions to enter judgment in favor of the defendants on these claims. On remand, we instruct the district court to dismiss the state-law claims without prejudice. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well."); *Taylor v. Waters*, 81 F.3d 429, 437 (4th Cir. 1996) (directing dismissal without prejudice of state-law claims on remand after holding district court erred in failing to grant summary judgment to the defendant on the plaintiff's § 1983 claims on the basis of qualified immunity).

VACATED AND REMANDED WITH INSTRUCTIONS

HALL, Circuit Judge, dissenting:

"Interlocutory appeals . . . are the exception, not the rule." *Johnson v. Jones*, 115 S. Ct. 2151, 2154 (1995). I would dismiss this interlocutory appeal because I believe that the district court's order "determines only a question of 'evidentiary sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial." *Id.* at 2156.

With regard to situations involving fleeing suspects, the law was clearly established in 1992 that the use of deadly force is only justified if the officers have "probable cause to believe that [the suspect] pose[d] a significant threat of death or serious injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). I agree that the analysis of qualified immunity in excessive force cases requires a examination of the particular circumstances faced by the officers to determine whether it was objectively reasonable for the officers to act as they did. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). I disagree with the majority's conclusion that the order involved in this interlocutory appeal turned on whether the plaintiff's version of the facts made out a violation of clearly, established law. *See ante* at 6 n.2.

After a detailed examination of the evidence, the district court concluded that "the submission by plaintiffs of the affidavit of two eyewitnesses[1] is sufficient to creak

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[1] Affidavit of Lionel Ginn: "Officer Keesler was completely out of the way of the pickup truck as it moved forward and rightward toward the parking lot gate. As Mr. Turnage began to drive by Officer Keesler, Keesler then shot his gun toward Mr.

a genuine issue of material fact critical the legal determination of whether reasonable officers would have known that their actions were unconstitutional." *Edmundson v. Keesler*, No. 5:94-CV-467-B0(3) at 8-9 (E.D.N.C. Nov. 6, 1995) (order). In other words, the district court felt that the picture painted by Ginn and Tyson was that Keesler ran alongside the truck as it was pulling away from him, and that a permissible inference from this picture was that the shots were fired solely to stop the fleeing Turnage. Under what I think we all agree was the established law, this is a picture of excessive force.

The majority reduces the picture drawn by the plaintiff to "extremely dangerous circumstances confronted by the officers--a rapidly moving truck driven by a fleeing felon and Keesler's close proximity to the truck." *Ante* at 8. The district court, however, felt that much of what actually happened was open to dispute, particularly whether the truck was coming toward Keesler or moving away from him and toward the parking lot exit when the shots were fired. Whether Keesler was actually in danger, whether he appeared to be in danger, whether he could reasonably have thought

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Turnage. . . . When I saw him shoot his gun, Officer Keesler was not in danger of being hit by the truck. I could not believe what I was seeing."

Affidavit of William Scott Tyson: "Officer Keesler was not in danger of being struck by the truck and his life was not in danger at the time he shot Ricky Turnage, as the truck was moving away from him and toward the parking lot exit."

he was in danger, and whether he and his partner fired *solely* to stop the fleeing Turnage, are clearly material facts. Whether we believe the record support or even dictates a finding in the officers' favor on the immunity issue[2] is irrelevant to the inquiry under *Johnson v. Jones*; all that matters at this point is that the *district court* thought that these factual disputes were genuine.

I respectfully dissent.

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[2] *Pittman v. Nelms*, 87 F.3d 116 (4th Cir. 1996), which is relied upon by the majority, *see ante* at 8, and which involved facts very similar to those in our case, was an appeal from a final order.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
RALEIGH DIVISION

No. 5:94-CV-467-B0(3)

LEONARD EDMUNDSON et al.,	)	
	)	
Plaintiffs,	)	
	)	ORDER
v.	)	
	)	
GRAYHAM KEESLER et al.,	)	
	)	
Defendants.	)	

This matter is before the undersigned on defendants' motion for partial summary judgment on the grounds of qualified immunity. The issue is whether defendant officers acted reasonably in using lethal force to serve an arrest warrant on a fleeing suspect. Finding a genuine issue of material fact necessary to the determination of the reasonableness of the officers' actions, the court denies defendants' motion for partial summary judgment.

On July 2, 1992, defendant officers Grayham Keesler and Daniel Peters traveled to the Franklin Baking Company in Goldsboro, North Carolina to serve an arrest warrant on Ricky Turnage, an employee of

Franklin. The warrant authorized the arrest of Turnage for selling 6.8 grams of marijuana five months earlier. When the defendant officers confronted Turnage, he asked if he could finish unloading his delivery truck. The officers acceded to his request. Some twenty to forty minutes later while the officers were conversing with Turnage's supervisors, Turnage ran out of the warehouse and into the parking lot in which his personal truck was parked. The officers followed. The parties' accounts of the events in the parking lot differ dramatically. In general terms, defendants argue that Turnage was in the process of running over Officer Keesler when the officers shot Turnage to death. Plaintiffs, on the other hand, allege that neither Keesler nor Peters was in danger of serious bodily harm. The evidence supporting each party's version is discussed below.

Defendants Keesler, Peters, Morgan, and Hill move for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, arguing that the doctrine of qualified immunity shields them from liability in this case. In order to grant a motion for summary judgment, the court must determine, in the light most favorable to the non-moving party, that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Under Rule 56, a party may move with or without supporting affidavit. Fed. R. Civ. P. 56(a). When a motion is made and supported, the non-moving party must set forth specific facts showing there is a genuine issue for trial in order to avoid summary judgment for the moving party if otherwise appropriate. Fed. R. Civ. P.

56(e); see Celotex v. Catrett, 477 U.S. 317 (1986). In the instant case both parties have submitted affidavits in support of their arguments on the motion for partial summary judgment.

A court's analysis of the underlying facts on a motion for summary judgment on the grounds of qualified immunity should proceed no differently than in any other context. Buonocore v. Harris, 65 F.3d 347, 359 (4th Cir. 1995). If a plaintiff has alleged a clearly established right, summary judgment is improper as long as there remains any genuine issue of material fact regarding the actual conduct of the defendants. Id. at 359-60. A genuine issue of material fact exists if a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In deciding whether an official is entitled to qualified immunity, the court must (1) identify the specific constitutional right allegedly violated, (2) determine whether that right was clearly established at the time of the alleged violation, and (3) determine whether a reasonable person in the official's position would have known that his conduct would violate that right. Collinson v. Gott, 895 F.2d 994, 998 (4th Cir. 1990) (Phillips, J., concurring). The first and second of these inquiries are pure questions of law for the court, but the third, which is also a question of law, may sometimes require factual determinations pertaining to the conduct of a defendant and the attendant circumstances. Id.

Plaintiffs have alleged that defendants deprived Turnage of his Fourth and Fourteenth Amendment rights to be free from unreasonable seizure. Specifically, plaintiffs aver that Officers Keesler and Peters used unconstitutionally excessive and lethal force in their attempt to arrest Turnage. Having identified the specific constitutional right allegedly violated, the court must ascertain whether the right was so clearly established as to put a reasonable defendant on notice that his conduct violated that right. Anderson v. Creighton, 483 U.S. 635, 640 (1987); Collinson, 895 F.2d at 998. In Tennessee v. Garner, 471 U.S. 1 (1985), the United States Supreme Court held that the use of deadly force to prevent the escape of an apparently unarmed suspected felon is unconstitutional unless such force "is necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." Id. at 3; see Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir. 1991). Additionally, it is undisputed that Keesler and Peters were aware of this limitation on the use of deadly force from the training they had received as officers. Hill Aff. ¶ 8; Morgan Aff. ¶¶ 3, 4, 8. Thus, the court concludes that reasonable officers would be aware of the general right allegedly violated.

The final determination required of the court is whether a reasonable officer would have known that his conduct violated Turnage's rights. A police officer should prevail on an assertion of qualified immunity if a reasonable officer possessing the same information could have believed that his conduct was lawful. Anderson, 483 U.S. at 641. In evaluating the factual context, the

reasonableness standard requires a court to focus on the circumstances as they appeared to exist at the time the events were unfolding, affording interpretive latitude to official judgments. Gooden v. Howard County, 954 F.2d 960, 965 (4th Cir. 1992); Torchinsky v. Siwinski, 942 F.2d 257, 261 (4th Cir. 1991).

Accordingly, if a reasonable officer in the position of Keesler could have found probable cause to believe that Turnage posed a serious threat of personal bodily harm at the time Keesler shot Turnage, then as a matter of law, Keesler is entitled to qualified immunity. Similarly, if a reasonable officer in the position of Peters could have found probable cause to believe that Turnage posed a serious threat of bodily harm to Keesler at the time Peters shot Turnage, then eters is entitled to qualified immunity as a matter of law. Both inquiries, however, require the court to analyze the facts surrounding the relative positions and movements of Turnage, Peters, and Keesler.

According to the affidavits given by Officers Keesler and Peters, they chased Turnage as he fled from the bakery warehouse demanding that he stop. Keesler Aff. ¶ 27; Peters Aff. ¶ 12. Ignoring the officers' demands, Turnage jumped into his truck, started the engine, and backed the truck in a clockwise direction, nearly hitting Peters who stood behind the truck with his pistol drawn. Keesler Aff. ¶¶ 31, 32; Peters Aff. ¶ 13. By the time the truck stopped, Peters had moved to a position near the driver's side door. Keesler Aff. ¶ 33; Peters Aff. ¶ 13. Meanwhile, Keesler stood in front of

the truck on the passenger's side. Keesler Aff. ¶ 33; Peters Aff. ¶ 14.

At this point defendants contend that Turnage raced the engine, turned the steering wheel to the right, and accelerated in disregard of warnings being yelled by the officers. Keesler Aff. ¶ 34; Peters Aff. ¶ 14. Turnage's truck then struck Keesler. Keesler Aff. ¶ 35. Standing with his left hand and chest against the hood, Keesler pointed his gun at Turnage. Keesler Aff. ¶ 35; Peters Aff. ¶ 15. While trying to retreat, Keesler fired one shot through the windshield at Turnage. Keesler Aff. ¶ 36. Officer Peters then fired two shots through the driver's side window at Turnage. Peters Aff. ¶ 15. After the shots, the truck proceeded into the street, halting after it hit a guy wire of a utility pole. Keesler Aff. ¶ 41; Peters Aff. ¶ 17, 19. Turnage was dead by the time the officers reached the truck. Keesler Aff. ¶ 44; Peters Aff. ¶ 20.

Observations by two witnesses support the account of the officers. The proprietor of the bakery and a delivery person observed Keesler standing in front of Turnage's truck with his left hand on the hood as Turnage drove forward. Stewart Aff. ¶ 4; Franklin Aff. ¶ 4. The witnesses saw Keesler fire his weapon only after Turnage drove in Keesler's direction. Stewart Aff. ¶ 4; Franklin Aff. ¶ 4. The proprietor also witnessed a police officer standing on the driver's side of the truck as it moved forward. Franklin Aff. ¶ 5.

In addition to the eyewitness accounts, affidavits by two experts based upon the physical evidence collected at the scene corroborate the stories of the officers. The ballistics reports and the autopsy reveal that Keesler fired his gun once while positioned in front of the truck to the passenger's side of the center of the truck. Ross Aff. ¶ 18; Matthews Aff. ¶ 10, 16. The bullet passed through the windshield, through Turnage's chin, and into Turnage's chest. Ross Aff. ¶ 18; Matthews Aff. ¶¶ 10, 16. Keesler's palm prints were found on the hood of Turnage's truck in a position consistent with where Keesler would have had to have stood in order to have fired the bullet which traveled through the windshield. Ross Aff. ¶ 19; Matthews Aff. ¶ 15. The ballistics reports also show that Peters fired one shot from a position just slightly in front of the driver's side door and a second shot from beside the driver's side door. Ross Aff. ¶ 20; see Matthews Aff. ¶¶ 11, 12, 16. One bullet struck Turnage's chest, lodging in his heart, and the other traveled through his arm. Ross Aff. ¶ 20; Matthews Aff. ¶¶ 11, 12. Additionally, tire impressions in the gravel parking lot indicate that the truck accelerated rapidly. Id. ¶ 21.

Plaintiffs rebut defendants' account of the incident with affidavits from Turnage's supervisors who also witnessed the incident. According to Lionel Ginn and William Scott Tyson, after Turnage jumped in his truck he drove a short distance forward up an embankment where Keesler stood with his gun drawn. Ginn Aff. ¶ 8. Keesler pounded on the truck's hood yelling at Turnage to stop. Ginn Aff. ¶ 8. Turnage then stopped and backed out of his parking space in a semicircular manner

positioning his truck so that it pointed in the direction of the parking lot gate leading to the public street. Ginn Aff. ¶ 8; Tyson Aff. ¶ 7. Keesler followed the truck placing himself two to four feet from the front corner on the driver's side. Ginn Aff. ¶ 8; Tyson Aff. ¶ 7. Turnage then began to drive forward and to the right, away from Officer Keesler. Ginn Aff. ¶ 8; Tyson Aff. ¶ 7. Keesler fired his gun toward Turnage and then ran beside the truck shooting again into the driver's side window. Ginn Aff. ¶ 8; Tyson Aff. ¶ 7. The affiants did not see the position of Officer Peters, but swear that he was neither behind the truck nor in danger of being hit by the truck. Ginn Aff. ¶ 9; Tyson Aff. ¶ 10.

The affidavits submitted by the parties reveal two very different versions of the events eading to the death of Turnage. Defendants' account of the incident provides a factual basis upon which the court could conclude as a matter of law that the officers acted in accordance with constitutional standards in their use of lethal force. Because the doctrine of qualified immunity requires only that the officers act reasonably in response to the information they possess regarding the surrounding circumstances, Anderson, 483 U.S. at 641; Slattery, 939 F.2d at 216, defendants' evidence that Officer Keesler was in danger of being run over by Turnage would provide a basis for a finding of qualified immunity. Defendants' account of the events is not, however, undisputed. The affidavits of two eye-witnesses, submitted by plaintiffs, directly contravene defendants' version of the events. Specifically, plaintiffs' witnesses, who observed the entire incident, swear that Keesler stood to the driver's side of the truck as Turnage

accelerated forward and to the passenger's side. Such evidence would permit this court to hold that reasonable officers would have known that the use of lethal force was unconstitutional, thereby depriving defendant officers of the defense of qualified immunity.

The court finds that the submission by plaintiffs of the affidavits of two eye-witnesses is sufficient to create a genuine issue of material fact critical to the legal determination of whether reasonable officers would have known that their actions were unconstitutional. It is of no consequence that defendants have submitted what they believe to be conclusive physical and forensic evidence in support of their version of the facts. The existence of such evidence des not automatically render contradictory eye-witness testimony worthless. Instead, the value of that evidence, as well as of that submitted by plaintiffs, turns on an assessment of credibility that only a jury can make. The court therefore holds that a reasonable jury could find the facts as alleged by plaintiffs, thereby necessitating a trial as to the facts underlying the officers' use of lethal force.

Accordingly, defendants' motion for partial summary judgment on the grounds of qualified immunity is DENIED.

This 2nd day of November, 1995.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED January 2, 1997

No. 95-3125
CA-94-467-5-BO(3)

LEONARD EDMUNDSON, Administrator of the Estate of James Richard Turnage, Deceased; ALENE ROUSE YELVERTON; ROBERT YELVERTON; CRAIG YELVERTON; KAREN BENNETT; KATHY EDMUNDSON; LIBBY PEELE; ERIN JANNELL SHIRLEY, a minor, by and through her guardian, Janice Stocks; JANICE STOCKS, as Guardian ad Litem for the above

Plaintiffs - Appellees

v.

GRAYHAM KEESLER, individually and in his official capacity as an officer of the City of Goldsboro Police Department; DANIEL PETERS, individually and in his official capacity as an officer of the City of Goldsboro Police Department; JAMES P. MORGAN, individually and in his official capacity as Police Chief of the City of Goldsboro Police Department; CHESTER HILL, individually and in his official capacity as the Police Chief for the City of Goldsboro Police Department

Defendants - Appellants

and

THE CITY OF GOLDSBORO POLICE DEPARTMENT; CITY OF GOLDSBORO

Defendants

LEONARD EDMUNDSON, Administrator of the Estate of James Richard Turnage, Deceased; ALENE ROUSE YELVERTON; ROBERT YELVERTON; CRAIG YELVERTON; KAREN BENNETT; KATHY EDMUNDSON; LIBBY PEELE; ERIN JANNELL SHIRLEY, a minor, by and through her guardian, Janice Stocks; JANICE STOCKS, as Guardian ad Litem for the above

Plaintiffs - Appellees

v.

CITY OF GOLDSBORO

Defendant - Appellant

and

GRAYHAM KEESLER, individually and in his official capacity as an officer of the City of Goldsboro Police Department; DANIEL PETERS, individually and in his official capacity as an officer of the City of Goldsboro Police Department; JAMES P. MORGAN, individually and in his official capacity as Police Chief of the City of Goldsboro Police Department; CHESTER HILL, individually and in his official capacity as the Police Chief for the City of Goldsboro Police Department; THE CITY OF GOLDSBORO POLICE DEPARTMENT

Defendants

On Petition for Rehearing with
Suggestion for Rehearing *In Banc*

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX D

FILED: March 28, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-3125(L)
(CA-94-467-5-BO(3))

LEONARD EDMUNDSON, Administrator of the Estate of James Richard Turnage, Deceased; ALENE ROUSE YELYERTON; ROBERT YELVERTON; CRAIG YELVERTON; KAREN BENNETT; KATHY EDMUNDSON; LIBBY PEELE; ERIN JANNELL SHIRLEY, a minor, by and through her guardian, Janice Stocks; JANICE STOCKS, as Guardian ad Litem for the above,

Plaintiffs - Appellees,

versus

GRAYHAM KEESLER, individually and in his official capacity as an officer of the City of Goldsboro Police Department; DANIEL PETERS, individually and in his official capacity as an officer of the City of Goldsboro Police Department; JAMES P. MORGAN, individually and in his official capacity as Police Chief of the City of Goldsboro Police Department; CHESTER HILL, individually and in his official capacity as the Police Chief for the City of Goldsboro Police Department,

Defendants - Appellants,

and

THE CITY OF GOLDSBORO POLICE DEPARTMENT; CITY OF GOLDSBORO,
Defendants.

ORDER

Appellees have filed a motion to dismiss these consolidated appeals, appellants filed a response in opposition to the motion and appellees filed a reply in support of the motion. Appellants have filed a motion for emergency stay of district court proceedings pending appeal, appellees filed a response in opposition to the motion and appellants filed a reply in support of the motion.

The Court denies appellees' motion to dismiss appeals and grants appellants' motion for stay of district court proceedings pending appeal.

Entered at the direction of Judge Luttig with the concurrence of Judge Hall and Judge Williams.

For the Court

/s/ Bert M. Montague
Clerk

APPENDIX E

FILED: March 28, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-3125(L)
(CA-94-467-5-BO(3))

LEONARD EDMUNDSON, Administrator of the Estate of James Richard Turnage, Deceased; ALENE ROUSE YELYERTON; ROBERT YELVERTON; CRAIG YELVERTON; KAREN BENNETT; KATHY EDMUNDSON; LIBBY PEELE; ERIN JANNELL SHIRLEY, a minor, by and through her guardian, Janice Stocks; JANICE STOCKS, as Guardian ad Litem for the above,

Plaintiffs - Appellees,

versus

GRAYHAM KEESLER, individually and in his official capacity as an officer of the City of Goldsboro Police Department; DANIEL PETERS, individually and in his official capacity as an officer of the City of Goldsboro Police Department; JAMES P. MORGAN, individually and in his official capacity as Police Chief of the City of Goldsboro Police Department; CHESTER HILL, individually and in his official capacity as the Police Chief for the City of Goldsboro Police Department,

Defendants - Appellants,

and

THE CITY OF GOLDSBORO POLICE DEPARTMENT; CITY OF GOLDSBORO,
Defendants.

ORDER

The last paragraph of the order of this Court filed on March 28, 1996 is corrected as follows:

Entered at the direction of Judge Luttig with the concurrence of Judge Williams. Judge Hall voted to dismiss.

For the Court

/s/ Bert M. Montague
Clerk

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
RALEIGH DIVISION

No. 5:94-CV-467-B0(3)

LEONARD EDMNDSON et al.,	)	
	)	
Plaintiffs,	)	
	)	ORDER
v.	)	
	)	
GRAYHAM KEESLER et al.,	)	
	)	
Defendants.	)	

This matter is before the undersigned on defendants' motion to dismiss most of plaintiffs' claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In addition, plaintiffs "concede dismissal" of several of their claims. Each claim is discussed separately below.

This case arises out of the shooting death of Ricky Turnage by Goldsboro police officers. On July 2, 1992, Officers Keesler and Peters attempted to serve an arrest warrant on Turnage at his place of employment. After speaking with Turnage, the officers agreed to

permit Turnage to finish unloading his delivery truck before taking him into custody. In the interim while the officers were conversing with Turnage's supervisor, Turnage darted out of the warehouse toward his pickup truck. The officers pursued Turnage who started his engine and began to drive away. Allegedly fearful that Turnage was going to run over at least one of them, the officers fired shots, killing Turnage immediately. As a result the decedent's estate and his family bring claims under 42 U.S.C. § 1983 and North Carolina law. Defendants now move to dismiss plaintiffs' claims.[1]

Before addressing defendants' motion to dismiss, the court notes that in their brief plaintiffs "concede dismissal" of the following claims: (1) claims against the Goldsboro Police Department; (2) claims against Grayham Keesler, Daniel Peters, James Morgan, and Chester Hill in their official capacities; (3) claims for punitive damages against the City of Goldsboro; and (4) the estate's claims against Keesler, Peters, Morgan, and Hill in their individual capacities for violations of Turnage's Fifth, Eighth, and Fourteenth amendment rights. Construing plaintiffs' "concessions" as a motion for voluntarily dismissal pursuant to Rule 41(a), the court DISMISSES these claims WITH PREJUDICE.

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[1] The only claims not the object of this motion are the estate's wrongful death claim and the estate's § 1983 claim based on violation of the decedent's Fourth Amendment rights. In an earlier ruling, Edmundson v. Keesler, 904 F. Supp. 478 (E.D.N.C. 1995), this court denied defendants' motion for summary judgment on the latter claim.

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil procedure a court should not dismiss an action for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Randall v. United States, 30 F.3d 518, 522 (4th Cir. 1994), cert. denied, 115 S. Ct. 1956 (1995). When reviewing the claims, a court must accept the factual allegations of the complaint as true. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515-16 (1972); Randall, 30 F.3d at 522. Furthermore, the court must construe those factual allegations in the light most favorable to the plaintiff. Randall, 30 F.3d at 522.

First and Fourteenth Amendment Claims

Plaintiff family members allege that defendants violated their "substantive due process rights not to be deprived of the society, companionship, life, love, comfort, association and support of [decedent] in violation of the Fifth and Fourteenth Amendments" to the United States Constitution. Compl. ¶ 73. In addition, these plaintiffs aver that defendants deprived them of their right to "continued familial associations [with decedent] guaranteed by the First and Fourteenth Amendments." Id. ¶ 73.

As plaintiffs indicate in their brief, courts in circuits other than the fourth have recognized a separate constitutional liberty interest of "intimate association." See Rucker v. Harford County, 946 F.2d 278, 282 (4th Cir. 1991), cert. denied, 112 S. Ct. 1175 (1992). Some

courts have located the right in the First Amendment's guarantee of free association, see Trujillo v. Board of County Comm'rs, 768 F.2d 1186, 1189-90 (10th Cir. 1985), while others have relied on the substantive component of the Due Process Clause of the Fourteenth Amendment, see Kelson v. City of Springfield, 767 F.2d 651, 654 (9th Cir. 1985); Bell v. City of Milwaukee, 746 F.2d 1205, 1245 (7th Cir. 1984).

Nevertheless, the Fourth Circuit has explicitly refused to recognize this right. Shaw v. Stroud, 13 F.3d 791, 804-05 (4th Cir.), cert. denied, 115 S. Ct. 67, 68 (1994). In Shaw the decedent was shot and killed by a police officer during an attempted arrest. Id. at 794. The wife, who witnessed the event, and the decedent's minor children brought several claims against the officer and his supervisor including a claim "for the loss of the love and support of a family member." Id. at 804. Finding that the Supreme Court has never extended the constitutionally protected liberty interest incorporated by the Fourteenth Amendment Due Process Clause to encompass deprivations resulting from governmental actions affecting family members only incidentally, the court affirmed summary judgment against the decedent's family. Id. at 805. Thus, Shaw precludes plaintiffs from stating a claim under the Fourteenth Amendment.

Although Shaw concerned only a Fourteenth Amendment claim, its reasoning appears equally applicable to plaintiffs' First Amendment claim. First, the interest underlying each claim, loss of an intimate familial relationship, is identical. Second, the Supreme Court has never extended the First Amendment's guarantee of free

association to protect such a right. Finally, in an earlier case, the Fourth Circuit recognized that both the First Amendment and the Fourteenth Amendment provide theoretical alternatives for protecting these identical interests. Rucker, 946 F.2d at 282. Accordingly, the claims of plaintiff family members for violations of their First and Fourteenth Amendment rights are DISMISSED WITH PREJUDICE.

Negligent Infliction of Emotional Distress

Plaintiffs Robert and Alene Yelverton, parents of the deceased, assert a claim for infliction of emotional distress against the defendant officers. These plaintiffs allege that they suffered severe emotional distress as a result of "learn[ing] that their son had been brutally shot and that his body had been mutilated." Compl. ¶ 91. Although plaintiffs fail to denominate this claim as one for negligent, rather than intentional, infliction of emotional distress, plaintiffs' brief clarifies that the claim asserted is of the negligent variety.[2]

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[2] In an effort to be thorough, defendants address both varieties of infliction of emotional distress in their motion and briefs. An ambiguity does arise because plaintiffs assert in the complaint and argue in their brief that defendants' actions were intentional rather than negligent. Plaintiffs' argument is based, however, solely on the law of negligent infliction of emotional distress. Furthermore, even a liberal construction of the complaint fails to reveal a claim for intentional infliction. Under North Carolina law, intentional infliction of emotional distress requires extreme and outrageous conduct which is intended to cause and does cause severe emotional distress to another. Dickens v. Puryear, 302 N.C. 437, 452 (1981). Plaintiffs' complaint does not allege the required intent.

To establish a claim for negligent infliction of emotional distress under North Carolina law, plaintiffs must allege that: (1) defendants negligently engaged in conduct; (2) it was reasonably foreseeable that such conduct would cause plaintiffs severe emotional distress; and (3) the conduct did in fact cause plaintiffs severe emotional distress. Hickman v. McKoin, 337 N.C. 460, 462 (1994). When viewed in the light most favorable to plaintiffs, the complaint facially satisfies the first and third elements of the claim. Although plaintiffs' complaint appears to allege intentional conduct by the officers with respect to the death of plaintiffs' son, the court finds that the complaint can be liberally construed to allege negligent conduct in the alternative.

The remaining issue is whether plaintiffs have sufficiently alleged the element of foreseeability. When plaintiffs attempt to recover for their own emotional distress arising from concern for another person, the determination of foreseeability requires an analysis of all facts alleged including: (1) plaintiffs' proximity to the negligent act causing injury to the other person; (2) the relationship between plaintiffs and the other person; and (3) whether plaintiffs personally observed the negligent act. Id. (quoting Sorrells v. M.Y.B. Hospitality Ventures of Asheville, 334 N.C. 669, 672-73 (1993)).

In this regard, a review of plaintiffs' complaint reveals only a conclusory statement that "[i]t was reasonably foreseeable by defendants . . . or it should

have been foreseeable that their acts and omissions would cause such injury and severe emotional distress to plaintiffs." Compl. ¶ 92. Plaintiffs fail to allege that they were in close proximity to the incident or that they witnessed either the shooting itself or its immediate aftermath. In fact, they do not allege seeing decedent's corpse until the viewing at the funeral. Apparently, plaintiffs rely simply on their parent-child relationship with the decedent and their subsequent knowledge of the details of the shooting. However, "the parent-child relationship, standing alone, is insufficient to establish reasonable foreseeability." Hickman, 337 N.C. at 464.

In Hickman the minor children of a woman involved in a car accident brought an action against the responsible negligent driver. Id. at 461. Plaintiffs, who were at home at the time of the accident, alleged that they suffered severe distress after they were told later that day that their mother was not likely to survive her injuries. Id. Plaintiffs also visited their mother in the intensive care unit and witnessed her pain and suffering as she endured a series of life-threatening operations over the next several years. Id. Finding these facts insufficient to establish plaintiffs' allegation of foreseeability, the North Carolina Supreme Court dismissed the action. Id. at 464; see also Gardner v. Gardner, 334 N.C. 662 (1993) (affirming summary judgment against plaintiff mother who witnessed unsuccessful resuscitative efforts on her son in emergency room because she neither witnessed nor was in close proximity to accident); Sorrells v. M.Y.B. Hospitality Ventures of Asheville, 334 N.C. 669 (1993) (affirming dismissal of complaint alleging that plaintiff

parents had learned after the accident that their son had been killed and his body mutilated).

In light of the complaint's omission of any factual allegations related to foreseeability other than the parents' relationship to the decedent and their acquisition of knowledge subsequent to the accident, the court finds that the complaint fails to state a claim for negligent infliction of emotional distress. Accordingly, plaintiffs' claim for negligent infliction of emotional distress is DISMISSED.

Desecration or Mutilation

Plaintiff family members also assert a claim of desecration of body against the City of Goldsboro. The complaint alleges that agents of defendant entered the funeral home and fingerprinted decedent's corpse without permission from any family member after it had been released to the family. Compl. ¶ 52. As a result plaintiffs aver that they suffered severe emotional distress. Compl. ¶¶ 111 53, 95.

Under North Carolina law the person entitled to possession of a body may recover damages for mental suffering caused by negligent or intentional mishandling or mutilation of the body. Dumouchelle v. Duke University, 69 N.C. App. 471, 474 (1984). Although North Carolina courts (or any other court in a published opinion) have not addressed whether fingerprinting of a corpse after it has been released to family members amounts to mutilation, the North Carolina Supreme Court has stated that "the next of kin has a quasi-

property right in the body--not property in the commercial sense but a right of possession for the purpose of burial--and that there arises out of this relationship to the body an emotional interest which should be protected and which others have a duty not to injure intentionally or negligently." Parker v. Quinn-McGowen Co., 262 N.C. 560, 561 (1964).

Neither the pleadings nor the briefs discuss the circumstances attendant to the alleged fingerprinting with any specificity. Whether the alleged fingerprinting resulted in any disfigurement of the corpse, cf. Parker, 262 N.C. at 562-63 (holding that unauthorized embalming does not constitute mutilation because, inter alia, it does not involve disfigurement or dismemberment), and the timing of the fingerprinting vis-a-vis the viewing are two facts critical to the determination of whether plaintiffs have stated a claim. Certainly, the extent of any disfigurement, such as the existence of more than de minimis ink markings on the decedent's hands and fingers, and the proximity of the act or the family's acquisition of knowledge of the act to the viewing are pertinent to whether defendant interfered with plaintiffs' quasi-property right in burying the body with appropriate dignity. Given these omissions in the pleadings, this court cannot hold as a matter of law at this stage in the proceedings that plaintiffs can prove no set of facts that would entitle them to relief.

Defendant's contention that § 15A-502 of the North Carolina General Statutes required the fingerprinting is not, by itself, sufficient to bar plaintiffs' action. In pertinent part that statute provides that "[i]t

shall be the duty of the arresting law-enforcement agency to cause a person charged with the commission of a felony to be fingerprinted and to forward those to the State Bureau of Investigation." N.C. Gen. Stat. § 15A-502(a). Defendant has failed to demonstrate that an arrest was actually effectuated. Additionally, even if defendant had the right, or duty, to fingerprint the corpse while it was in defendant's custody, that right terminated upon delivery of the corpse to plaintiffs. After delivery defendant could have sought consent from family members or obtained a court order.

Defendant also argues that if a claim for desecration or mutilation exists, only plaintiff's daughter has standing to assert that claim. "As a general rule, only the person entitled to possession and disposition of a body may maintain an action for mishandling or mutilation of the body." Dumouchelle v. Duke University, 69 N.C. App. 471, 474 (1984) (emphasis added). Thus, when no surviving spouse exists, the cause of action vests in the next of kin, including minor children. Morrow v. Southern Ry., 213 N.C. 127, 128 (1938). "[N]ext of kin means nearest of kin--the nearest blood relations of the person designated." In re Will of Cobb, 271 N.C. 307, 309 (1967). In the case at bar, the parents and the daughter of the decedent have standing because they are each one degree of kinship from decedent. See N.C. Gen. Stat. § 104A-1 (computation of degrees of kinship).

Accordingly, defendant City of Goldsboro's motion to dismiss plaintiffs' claim for desecration or mutilation is DENIED with respect to plaintiffs Alene

Rouse Yelverton, Robert Yelverton, and Erin Jannell Shirley, but is GRANTED with respect to all other plaintiffs.

Conclusion

As specified above, defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART. Consequently, the following claims remain viable: (1) the estate's claim for wrongful death against the City of Goldsboro and Keesler, Peters, Morgan, and Hill in their individual capacities; (2) the estate's § 1983 claim based on Fourth Amendment violations against the City of Goldsboro and Keesler, Peters, Morgan, and Hill in their individual capacities; and (3) Alene Rouse Yelverton, Robert Yelverton, and Erin Jannell Shirley's claim for desecration or mutilation against the City of Goldsboro. All other claims are DISMISSED pursuant to Rules 12(b)(6) and 41(a).

This 9th day of January, 1996.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
CIVIL ACTION NO.: 5:94-CV-467-BO(3)

LEONARD EDMUNDSON, Administrator of the Estate of JAMES RICHARD TURNAGE, Deceased; ALENE ROUSE YELVERTON, ROBERT YELVERTON, CRAIG YELVERTON KAREN BENNETT, KATHY EDMUNDSON, LIBBY PEELE, and ERIN JANNELL SHIRLEY, a Minor, By and Through Her Guardian Ad Litem, JANICE STOCKS,	)	
Plaintiffs,	)	
v.	)	AFFIDAVIT OF LIONEL GINN
GRAYHAM KEESLER, Individually and in his official capacity as an Officer of The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, DANIEL PETERS, Individually and in his official capacity as an Officer of The City of Goldsboro Police Department	)	

and The City of Goldsboro, North Carolina, JAMES P. MORGAN, Individually and in his capacity as Police Chief for The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, CHESTER HILL, Individually and in his official capacity as Police Chief for The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, THE CITY OF GOLDSBORO POLICE DEPARTMENT and THE CITY OF GOLDSBORO, NORTH CAROLINA, a municipal corporation organized under and pursuant to the laws of the State of North Carolina,

Defendants.

The undersigned, being first duly sworn, deposes and says that:

1. My name is Lionel Ginn, and I live at 3979 Central Heights Road, Goldsboro, North Carolina. I am a supervisor at the Franklin Baking Company in Goldsboro, North Carolina.

2. In submitting this affidavit to the Court, it is my intention to be a completely impartial and unbiased witness and not to side with either party in this litigation. I have been interviewed by counsel for plaintiffs and I have

been interviewed by representatives from the North Carolina State Bureau of Investigation and the defendants' attorneys, and I have provided to each the same accounting of what I observed at the time of the death of James Richard ("Ricky") Turnage.

3. On July 2, 1992, I was employed as a supervisor by Franklin Baking Company at their warehouse in Goldsboro, North Carolina. I was called by Carl Wadsworth, a fellow employee, to his office. Mr. Wadsworth handed me a piece of paper with Officer Keesler's name and telephone number on it with instructions to call Officer Keesler when Mr. Turnage returned to the warehouse from making his deliveries. Mr. Wadsworth told me not to tell Mr. Turnage anything about the call. Sometime later, Mr. Turnage's direct supervisor, Scott Tyson, came in and I gave the information to him.

4. At approximately 1:15 p.m. on the same date, Mr. Turnage backed his Franklin Baking Company delivery truck into the warehouse, at which time Mr. Tyson placed a call to Officer Keesler. About five minutes later, two police officers, Officer Keesler and Officer Peters, came into the warehouse, approached Mr. Tyson and me and asked if we were "boss men." I told them we were, and the officers then asked where Mr. Turnage was. Mr. Tyson said, "Right there," and pointed toward Mr. Turnage, who was standing at the back of his delivery truck. I then followed the officers and Mr. Tyson over to where Mr. Turnage was standing. I heard Officer Keesler tell Mr. Turnage that he had a warrant for his arrest for selling marijuana. Mr. Turnage replied by saying, "You've got the wrong man," and the officer replied, "No, we don't." Mr.

Turnage asked the officers if he could finish unloading his delivery truck, and they replied that they had "all day" and that it would be "fine" for Ricky to unload his truck. Mr. Turnage then started unloading his truck. At first the officers stood near the truck and watched him.

5. After a while, one of the officers, Officer Keesler, came to the desk area and started a conversation with Mr. Tyson and me. A little while later, the other officer, Officer Peters, joined us. Every once in a while, Mr. Turnage would walk to the front of his truck, and Officer Peters would go over to see what he was doing. Mr. Tyson told the officers at least two (2) times that if they wanted to go ahead and take Mr. Turnage downtown, someone else would finish unloading the truck. One of the officers replied that it would "probably be his [Mr. Turnage's] last day at work, so we'll let him finish."

6. After a while, both officers stopped paying much attention to what Mr. Turnage was doing. Instead, the officers were in the desk area, about 30-35 feet away from Mr. Turnage's truck, engaged in general conversation with Mr. Tyson and me. A while later, I was leaning back in my chair talking to the officers, and I heard Officer Peters say, "There he goes." I saw Ricky Turnage run out of the door on the west side of the warehouse leading towards the gravel parking lot on which his personal pickup truck was parked with its front facing the warehouse. Officer Peters turned and ran out of the bay doors on the south side of the building. Officer Keesler also ran out of the warehouse, using the same door that Mr. Turnage had run out of. By the time he reached the door, Officer Keesler already had his gun in his hand, and he ran out of the door with his gun

drawn. Both Scott and I followed Officer Keesler out of the door towards the area where Ricky's pickup truck was parked.

7. By the time I got out the door and onto the walkway that leads down the hill to the parking area, I saw that Mr. Turnage had already gotten into his truck. Mr. Turnage's truck was parked to my right with its front facing the warehouse as I stood on the walkway, approximately 65 feet away. I could see that Mr. Turnage had locked the doors and was starting his engine. Scott Tyson was standing next to me. I saw Officer Keesler at the passenger side of the pickup truck trying to open the truck's door. Officer Keesler was also yelling for Mr. Turnage to stop his truck. Keesler still had his gun in his hand.

8. Because of where he had parked his pickup truck and because the parking lot is fenced in, the only way for Mr. Turnage to leave the lot was to drive toward the parking lot gate leading to Carolina Street. Once Mr. Turnage got his vehicle started, he drove his truck forward a short distance up the embankment. By this time, Officer Keesler had moved to the front of Ricky's truck, within two to three feet of it. Officer Keesler stood in front of the truck with his gun in his hand pointed at the windshield yelling, "Stop, stop, stop." He hit the hood of the truck several times with his other hand. Ricky then stopped his truck and backed up in a semi-circular manner so that the front of his truck was then facing the gate exiting the parking lot. Officer Keesler followed Ricky's truck as Ricky drove his truck backwards and came to a position near the front corner of the truck, on the driver's side, again two to three feet from the truck. Mr. Turnage then began to drive his

truck forward and rightward towards the gate leaving the parking lot. The motion of the pickup truck and Officer Keesler's movements put Officer Keesler to the right side/driver's side of the truck. At this point in time, Officer Keesler was completely out of the way of the pickup truck as it moved forward and rightward toward the parking lot gate. As Mr. Turnage began to drive by Officer Keesler, Keesler then shot his gun toward Mr. Turnage. As Mr. Turnage's truck continued moving forward and away from Officer Keesler, Officer Keesler ran beside the truck and shot into the driver's side window two or three more times. Officer Keesler never fell, and he was not hit by the truck. When I saw him shoot his gun, Officer Keesler was not in danger of being hit by the truck. I could not believe what I was seeing. I could not believe Officer Keesler shot Mr. Turnage. I saw Mr. Turnage in his truck as he went by. It looked like Mr. Turnage had been hit by a bullet because of the way he was slumped over. Mr. Turnage's truck kept moving forward, and he drove his truck out of the parking lot through the gate and drove up Carolina Street. His pickup truck struck a guy wire on the right side of Carolina Street and came to a stop.

9. During this time, while I do not know precisely where Officer Peters was or if he fired his weapon, he was never in my field of vision as I witnessed these events and saw Ricky being shot. Officer Peters was not behind Ricky's truck. I saw Ricky's truck leave the parking lot. As it left the lot, I saw Officer Peters near the front gate of the parking lot leading onto Carolina Street.

10. I saw Mr. Franklin outside the gate. Mr. Franklin asked me, "What the hell is going on." I told Mr. Franklin that the police had just shot Ricky Turnage.

11. After the incident, I went back and looked at the parking lot. There was a lot of glass from Mr. Turnage's truck in the area where Mr. Turnage had stopped after backing his truck up.

Further this affiant sayeth not.

This the 10th day of January, 1995.

/s/ Lionel Ginn
Lionel Ginn

Sworn to and subscribed before me, this the 10th day of January, 1995.

/s/ Tricia A. Millward
(SEAL) Notary Public

My Commission Expires:

4/29/95

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
CIVIL ACTION NO.: 5:94-CV-467-BO(3)

LEONARD EDMUNDSON, Administrator of the Estate of JAMES RICHARD TURNAGE, Deceased; ALENE ROUSE YELVERTON, ROBERT YELVERTON, CRAIG YELVERTON, KAREN BENNETT, KATHY EDMUNDSON, LIBBY PEELE, and ERIN JANNELL SHIRLEY, a Minor, By and Through Her Guardian Ad Litem, JANICE STOCKS,	)	
Plaintiffs,	)	
v.	)	AFFIDAVIT OF WILLIAM SCOTT TYSON
GRAYHAM KEESLER, Individually and in his official capacity as an Officer of The City of Goldsboro Police Department and The City of Goldsboro, North Carolina,	)	

DANIEL PETERS, Individually and in his official capacity as an Officer of The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, JAMES P. MORGAN, Individually and in his capacity as Police Chief for The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, CHESTER HILL, Individually and in his official capacity as Police Chief for The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, THE CITY OF GOLDSBORO POLICE DEPARTMENT and THE CITY OF GOLDSBORO, NORTH CAROLINA, a municipal corporation organized under and pursuant to the laws of the State of North Carolina,

Defendants.

The undersigned, being first duly sworn, deposes and says that:

1. My name is William Scott Tyson, and I live at 489 Potts Road, Dudley, North Carolina. I am employed as a supervisor at Franklin Baking Company in Goldsboro.

2. In submitting this affidavit to the Court, it is my intention to be a completely impartial and unbiased witness and not to side with either party in this litigation. I have been interviewed by counsel for plaintiffs and I have been interviewed by representatives from the Goldsboro Police Department, and I have provided to each the same accounting of what I observed at the time of the death of James Richard ("Ricky") Turnage.

3. I was Ricky Turnage's immediate supervisor for over three (3) years. Mr. Turnage was a good employee and had never missed a day's work while I was his supervisor.

4. On July 2, 1992 at approximately 11:00 a.m., I returned to the Franklin Baking Company warehouse from Mt. Olive, where I had been on business. Lionel Ginn, another supervisor, approached me and told me that he had gotten a message that someone should call Officer Graham Keesler of the Goldsboro Police Department when Ricky Turnage returned to the warehouse from making his deliveries. Lionel went on to say that Mr. Turnage was not to be notified about what was going on.

5. When I saw Mr. Turnage drive his delivery truck into the Franklin Baking Company lot, I called Officer Keesler to advise him that Mr. Turnage had arrived back at the warehouse. About five minutes later, Officers Keesler and Peters arrived at the warehouse and entered the building

where Lionel Ginn and I were standing. The officers asked where the "boss" man was, and I explained to them that both Lionel and I were supervisors. They then asked where Ricky Turnage was, and I then walked with the officers to where Mr. Turnage was working. Mr. Turnage had backed his delivery truck into the warehouse and he was unloading the truck. Mr. Turnage was then told by the officers that they had a warrant for his arrest for the possession and sale of marijuana. Mr. Turnage replied, "Not me," and the officers said, "Yes, you." Mr. Turnage then asked if he could unload his truck before he was taken from the warehouse, and the officers said he could. Lionel Ginn and I then sat down at the desk located outside the office area in the warehouse, approximately 30-35 feet from where Mr. Turnage's delivery truck was located. We sat there, waited and watched.

6. At first, the officers stayed with Mr. Turnage while he unloaded his truck, one on each side of the truck. After about 15 minutes, Officer Keesler came to the desk where Mr. Ginn and I were sitting and started a conversation. I asked Officer Keesler why Mr. Turnage was being arrested, and he told me that Ricky had sold some marijuana to an undercover agent. After 35-40 minutes had passed, Officer Peters also came over to the desk area and sat down and joined in the conversation I was having with Mr. Ginn and Officer Keesler. A short time later, one of the officers yelled, "There he goes." I never saw Mr. Turnage leave the warehouse, but I saw the door on the west side of the building closing behind him. Officer Keesler then ran out of the same door behind Mr. Turnage. Officer Peters ran out of the bay door on the south side of the building in a direction toward the gate to the warehouse

parking area leading to Carolina Street. Mr. Ginn and I ran out the door on the west side of the warehouse behind Officer Keesler.

7. As I went out of the door onto the sidewalk, I could see that Mr. Turnage was already in his pickup truck and Officer Keesler was on the passenger side of the truck. Officer Keesler held his pistol out in his right hand, and with his left hand he was trying to open the passenger door. Officer Keesler was telling Mr. Turnage to stop. Mr. Turnage started his truck, put it in reverse, and backed his truck up in a rightward, semi-circular manner. Mr. Turnage stopped with the front of his pickup truck facing the gate leading from the warehouse parking lot onto Carolina Street. At this time Officer Keesler ran at an angle to the front driver's side of Mr. Turnage's truck and yelled for Mr. Turnage to stop. Officer Keesler was less than three feet in front of Mr. Turnage's truck. Officer Keesler still held his pistol in his right hand. As Mr. Turnage then drove forward and rightward toward the parking lot exit, Officer Keesler pushed off the truck and moved over to the driver's side of the truck out of the path of the truck. Ricky was still driving his truck forward and to his right, away from where Officer Keesler was positioned. Officer Keesler then shot into the vehicle through the driver's side window.

8. Mr. Turnage did not drive his pickup truck toward Officer Keesler after Officer Keesler stepped to the driver's side of the truck. Officer Keesler was not in danger of being struck by the truck and his life was not in danger at the time he shot Ricky Turnage, as the truck was moving away from him and toward the parking lot exit. If Officer Keesler's life was ever placed in danger, it was when he ran

in front of the moving vehicle, before he fired his gun through the driver's side window after he moved out of the way of the truck.

9. After the shooting, Mr. Turnage's vehicle went out of the gate, past Officer Peters and onto Carolina Street. Officer Keesler followed the truck out of the parking lot on foot.

10. I am not sure exactly where Officer Peters was when Officer Keesler shot Ricky Turnage, but I remember that he was somewhere close to the area of the parking lot where the gravel pavement meets the asphalt near the parking lot gate. I did not see Officer Peters behind Ricky's pickup truck and he was not in danger of being hit by the truck when Officer Keesler fired.

11. Following the incident, I walked across Carolina Street where I saw Mr. Franklin, Sr., who wanted to know what was going on. I told Mr. Franklin about what had happened. Mr. Franklin and I then rode to the intersection where Mr. Turnage's truck had struck the guy wire.

12. After the accident, I had a chance to examine the Franklin Bakery parking lot. I saw mirrored glass on the parking lot in the area where Mr. Turnage stopped his truck after he had backed up and before he started forward.

Further this affiant sayeth not.

This the 10th day of January, 1995.

/s/ William Scott Tyson
William Scott Tyson

Sworn to and subscribed before me, this the 10th day of January, 1995.

/s/ Tricia A. Millward
(SEAL) Notary Public

My Commission Expires:

4/29/95

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